

**BEFORE THE STATE BOARD OF MEDIATION
STATE OF MISSOURI**

INTERNATIONAL UNION OF ELECTRONIC)	
ELECTRICAL, SALARIED, MACHINE AND)	
FURNITURE WORKERS, LOCAL 1107)	
)	
Petitioner,)	Public Case No. UC 98-039
)	(Cross Reference No. R 96-004)
v.)	and
)	Public Case No. UC 98-040
PARKWAY SCHOOL DISTRICT)	(Cross Reference No. R 96-025)
)	
Respondent.)	

JURISDICTIONAL STATEMENT

The State Board of Mediation is authorized to hear and decide issues concerning appropriate bargaining units by virtue of Section 105.525, RSMo. 1994. The matters before the State Board of Mediation arise from the filing by the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, Local 1107 (hereinafter referred to as the Union) of two petitions for clarification of bargaining units established by a previous decision of the State Board of Mediation. The respondent in both cases is the Parkway School District (herein after referred to as the District). The two petitions for clarification were consolidated for hearing and decision¹. In Case No. UC 98-039, the Union contends that the District reclassified two bargaining unit positions, painter and carpenter, and removed the positions from the bargaining unit. In its response, the District maintains that the waterproofing² technician and roof repair technician positions are newly created positions that were never in the bargaining unit. In addition, the District maintains that the waterproofing technician and roof repair technician are managerial positions that should not be included in the bargaining unit. In Case No. UC 98-040, the Union contends that the District improperly removed a Mail/Confidential Delivery Driver

¹ These cases were confusing and were made more so by the way the parties presented their evidence and arguments.

² The position of waterproofing technician was also referred to as the weatherproofing technician.

position from the bargaining unit. The District maintains that additional confidential job duties were added to the position and that the position should now be excluded from the bargaining unit as a confidential employee position. A hearing on these matters was held on July 16, 1998 in Chesterfield, Missouri, at which representatives of the Union and the City were present. The case was heard by State Board of Mediation Chairman John Birch, Employee Member Patrick Hickey, and Employer Member Lois Vander Waerdt. At the hearing the parties were given full opportunity to present evidence and make their arguments. Afterwards, the parties filed briefs. After a careful review of the evidence and the arguments of the parties, the Board sets forth the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

In *International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, Local 1107 v. Parkway School District*, Case No. R 96-004 (SBM 1996) the Union asked the Board to decide the appropriateness of a unit consisting of all District maintenance, custodial and warehouse employees. On February 21, 1996, the Board entered its decision in that case and ordered that two separate elections be held. On April 3, 1996, in Case No. R 96-004, the Union won the representation election and became the bargaining representative of all District maintenance and grounds employees. On April 4, 1996, in Case No. R 96-025, the Union won the representation election and became the bargaining representative of all District custodial and warehouse employees. The Board certified both bargaining units. The Union and the District entered into an agreement concerning the employees in both bargaining units. The agreement became effective July 1, 1996. The agreement specifically provides that "It is the intent of the parties that a salaried employee will not replace a union employee on a permanent full time basis."

The District has a job classification entitled carpenter. The carpenters work in the maintenance group and are supervised by the maintenance supervisor, Jerry Salovitz. The

carpenter job classification is included in the maintenance and grounds bargaining unit. The carpenter job classification is also covered by the agreement between the Union and the District.

The job duties of the carpenter classification are as follows: repair and install suspended ceilings; repair desk and cabinets; construct new cabinets, bookcases and tables; install and repair formica tops and edges; repair and replace toilet partitions, latches, etc.; lay out and construct new drywall partitions, doors, frames, and trim; hang mirrors, cabinets, pictures, chalkboards and/or bulletin boards on any surface; cut and install plexiglass and glass; repair window frames; repair window locks, latches and mechanisms; repair carpet; prepare floor and install new carpet; repair roofs and flashing leaks; prepare, layout and install floor tiles; and perform other duties assigned.

Tim Downey was a carpenter for the District and he was assigned to roof repair. He reported to the District's construction supervisor, Ralph Tidwell, concerning his roof repair duties. However, Mr. Tidwell was not Mr. Downey's supervisor and Mr. Tidwell could not hire or fire a District carpenter.

Mr. Downey received training in investigating and charting roof leaks. He also received training in repairing and patching roofs. Mr. Downey worked on the roofs by himself. He inspected roofs, investigated roof leaks, and performed minor roof repairs. In addition, Mr. Downey worked with the outside roofing companies with which the District contracted and reported to the companies the types of repairs that needed to be performed. Mr. Downey also replaced damaged ceiling tiles.

During the time to which Mr. Downey was assigned to roof repair, the District contracted with an outside roofing contractor, Bartch Roofing Company, to perform both major and minor roof repairs. Mr. Downey would coordinate roofing activities with Bartch Roofing Company. Mr. Downey would ensure that Bartch Roofing Company showed up and he would direct them to

where roof repairs were needed. While assigned to the roof repair position, Mr. Downey learned a lot about roof repair by working with the Bartch Roofing Company.

Mr. Downey left the District's employ in July of 1996. The District did not fill the carpenter position vacated by Mr. Downey. Instead, in the fall of 1996, the District hired Bill McDaniel to fill the position of "roof repair technician," a non-bargaining unit position. Mr. McDaniel is assigned to the planning group. Mr. McDaniel's immediate supervisor is the District Engineer, Scott Bennett.

Mr. McDaniel has been a supervisor for the Bartch Roofing Company. He had supervised Bartch Roofing Company employees performing roof repairs on the District's buildings. Mr. McDaniel had also personally performed some of the roof repairs on the District's buildings.

When Mr. McDaniel came to work for the District in the fall of 1996, he joined the Union. However, after he had been employed by the District for approximately two months, Mr. McDaniel was informed that his position as roof repair technician was not a Union position.

The job duties of the roof repair technician include: repairing roofs; investigating roof leaks, foundation leaks, window leaks, HVAC leaks; repairing wall, window and door leaks; following up on repairs to insure their success; performing preventive maintenance - roof inspections, cleaning all roof drains, gutters, downspouts, removing roof debris; assisting in determining roof replacement; assisting architects and roofing contractors, as needed; assisting the Audio Visual Department with antenna installation to insure no damage is done to roof; charting, logging and mapping of all reported roof leaks, including following-up after repairs; replacing ceiling tile; performing small "A" projects - wall, door, shelf removal and installation; and investigating carpet work requests.

As the roof repair technician, Mr. McDaniel takes emergency calls concerning roof leaks and follows up on roof leaks. He will either make the repair himself or call in the outside roofing

contractor with which the District has a blanket roofing contract to perform the work. During the summer, he will coordinate with the contractors performing roofing projects for the District to ensure their needs are met. During the winter he does general maintenance. In addition, Mr. McDaniel performs preventive maintenance such as checking drains, checking gutters, inspecting roofs and making notes concerning the roofs' general condition and need for replacement. He inspects carpet repairs and he replaces ceiling tile when they appear to be in a dangerous condition. Since Mr. McDaniel has been with the District, the District's expenditures to outside contractors have decreased.

Mr. McDaniel also assists the District Engineer and Construction Supervisor in reviewing roof repair plans, specifications and drawings. He makes comments on the review of these documents. Furthermore, Mr. McDaniel completes his own weekly work schedule and submits his schedule to the District Engineer on Friday or Monday. The District Engineer has the final authority concerning Mr. McDaniel's work schedule and retains the right to change the schedule when necessary. Although the District budgeted money for roof repair, Mr. McDaniel does not have any authority to approve purchases. However, like other employees that actually work with the materials, he can make recommendations concerning material purchases. Mr. McDaniel does not supervise any other employees. He cannot hire, fire or suspend. However, on two or three days a year Frank McCarty, the waterproofing technician, will assist him.

As the roof repair technician, Mr. McDaniel receives a yearly salary. However, the District has calculated an hourly rate for him based upon 2,080 hours of work per year. In addition, the District has a policy that permits salaried maintenance employees to receive compensatory time and overtime pay. In accordance with this District policy, Mr. McDaniel receives time and a half for overtime.

The District also has a job classification entitled painter. The painter's work in the maintenance group under the supervision of the carpenter and painting foreman, Mark Tessero.

The painter job classification is included in the maintenance and grounds bargaining unit. The Painter classification is also covered by the agreement between the Union and the District. The number of painters employed by the District at any one time has varied from six to ten.

The painter classification job duties include: prepare surface (spackle, mask, sand) for brush and roller application; patch paint and repair holes in drywall; tape new installations of drywall and finish; apply new plaster and replace complete plaster walls; install and repair vinyl wall covering and wallpaper; set up and operate airless spray apparatus; lay out, mark and paint parking lot, playground and gym lines; maintain painting machines; set up and operate sandblast equipment; mix and apply epoxy, varnish and lacquer finishes; clean up areas after performing painting and preparation tasks; and perform other duties assigned. Painters also caulk joints, seal surfaces, and perform other duties generally described as waterproofing.

Frank McCarty was a lead painter employed by the District. He was included in the bargaining unit. In the fall of 1996, the District promoted Mr. McCarty to a non-bargaining unit position entitled "waterproofing technician". There was no evidence that the District sought an individual from outside the District possessing specialized skills in waterproofing. Mr. McCarty possessed no greater skills than those possessed by the other painters within the bargaining unit. Mr. McCarty possessed no specialized skills concerning waterproofing. In fact, the evidence shows that Mr. McCarty is learning additional skills on the job. There was testimony that Jim Lucas, a bargaining unit painter, was promoted to lead painter and another painter was hired to replace Mr. Lucas. However, the District presented no evidence concerning position numbers to prove that Frank McCarty's position was in fact filled. Further, at the time of the hearing, a painter position in the maintenance group was open and had been open for sometime.

The job duties of the waterproofing technician include: repairing exterior caulked joints; sealing foundation walls; investigating wall, foundation, window and door leaks; repairing wall,

foundation, window and door leaks; following up on repairs to verify the success of the repairs; performing preventive maintenance - inspection of exterior caulked joints and minor repair of joints; charting, logging and mapping of all reported wall and foundation leaks; communicating with school administrative personnel about caulking and sealing activities; and replacing ceiling tiles and investigating carpet repair work.

Experience in caulk and sealant application was not mandatory for the waterproofing technician position, but such experience was preferred. The caulking suppliers and sealant suppliers would train the waterproofing technician in the proper use and application of their products. As previously stated, Mr. McCarty is learning additional skills on the job.

As waterproofing technician, Mr. McCarty's basic job is to prevent water penetration. His job duties include making inspections of the District's thirty-two buildings to identify areas which need to be addressed from a caulking standpoint. Since being promoted to waterproofing technician, Mr. McCarty has worked primarily at the District's North High School. Mr. McCarty and Chris Hagen, a painter within the bargaining unit, have been working on the exterior of the North High School. They grind and prepare the surface, clean it, recaulk the joints, and then spray sealer on the surface using a pressure-spraying machine. Mr. McCarty and Mr. Hagen have been riding in the same truck and have been using a two-man lift to work on the exterior of the building.

The district contracts with an outside contractor, Capitol Restoration, to do some of its waterproofing work. Since Mr. McCarty was promoted to waterproofing technician, the District's expenditures to Capital Restoration have decreased.

Mr. McCarty and Mr. Hagen have also hung wallpaper together. In addition, when Mr. McCarty cannot be outside due to inclement weather, he repairs ceiling tiles and insures he has the necessary materials for when the weather turns nice. Mr. McCarty also assists Mr. McDaniel, the roof repair technician, two or three days a year, in following up on roof leaks. Mr.

McCarty reports to the District Engineer, Scott Bennett. Mr. McCarty prepares his own weekly work schedule and submits his work schedule to the District Engineer on Friday or Monday. The District Engineer has the final authority concerning Mr. McCarty's work schedule and retains the right to change the schedule when necessary. Although the District budgeted money for waterproofing, Mr. McCarty does not have any authority to approve purchases. However, like other employees that actually work with the materials, he can make recommendations concerning material purchases. Since a lot of the materials Mr. McCarty uses come out of the maintenance budget, Mr. McCarty coordinates with the maintenance supervisor, Doug Stephens. In this way, the waterproofing position is tied to the maintenance group. In addition, Mr. McCarty obtains information concerning areas in which the District is experiencing problems from Mr. Stephen's maintenance personnel.

Mr. McCarty does not supervise any other employees. He cannot hire, fire, or suspend. However, he is assigned a bargaining unit employee from the maintenance group to assist him daily. Mr. McCarty has worked with Chris Hagen, a bargaining unit painter. In addition, he has worked with grounds employees, including Kirk Hill.

As the waterproofing technician, Mr. McCarty receives a yearly salary. However, the District has calculated an hourly rate for him based upon 2,080 hours of work per year. In addition, the District has a policy that permits salaried maintenance employees to receive compensatory time and overtime pay. In accordance with this District policy, Mr. McCarty receives time and a half for overtime.

Since 1995, the District has had a job classification entitled "mail/confidential delivery driver". This job classification was included in the custodial and warehouse employees bargaining unit in Case No. R 96-025. The mail/confidential delivery driver job classification was also covered by the agreement between the Union and the District. However, the District

reclassified this position as a confidential employee position and removed it from the bargaining unit.

The District has divided its interoffice mail delivery into two routes, a northern route and a southern route. There are District high schools, middle schools, and elementary schools on each route. Floyd Price, the mail/confidential delivery driver, delivers the mail, including confidential mail, on the northern mail route. He delivers mail to and from each school on the route. He also delivers mail to and from the United States Post Office and the District's mailroom. Tom Holly, a warehouse delivery driver, delivers the mail, including confidential mail, on the southern mail route. He delivers mail to and from each school on the route. He also delivers mail to and from the United States Post Office and the District mailroom.

Mr. Price and Mr. Holly are both assigned to the warehouse. They both wear the same type of uniform and drive the same type of vehicle. Furthermore, until recently, both men delivered confidential mail to the school board members' homes.

Approximately one year ago, the District reclassified the mail/confidential delivery position as a confidential employee position and removed the position from the bargaining unit. Mr. Price now delivers most of the confidential mail to the school board members' homes. At least in one case, Mr. Price has a key to the school board member's home and leaves the mail inside the house.

The mail which is delivered to the school board members homes includes confidential information concerning personnel matters, legal documents, and labor relations issues. However, the vast majority of time this confidential information is sealed in an envelope and the mail delivery person does not know the contents of the envelope. In addition, on rare occasions, Mr. Price will assist other District employees within the Superintendent's Office in assembling confidential information to be delivered to the school board members.

When Mr. Price is absent from work a bargaining unit delivery driver delivers the mail on the northern route. There have been instances when bargaining unit employees, substituting for Mr. Price, have delivered confidential mail to the school board members' homes. The bargaining unit delivery drivers do not have access to the interior of the homes and leave the mail in the screen door or garage. However, the District usually has one of its other confidential employees deliver the confidential mail to the school board members' homes when Mr. Price is unavailable.

The reclassification of the mail/confidential delivery driver position was not due to any specific problem concerning the leaking of confidential information or any great concern of the part of the District that confidential information would be leaked. Furthermore, the types of documents currently being delivered to the school board members homes do not differ significantly from the types of documents which were delivered by the bargaining unit delivery drivers prior to the reclassification of the mail/confidential delivery driver position. The District reclassified the mail/confidential delivery driver position due to an increased volume of confidential information and a perceived need on the part of the District for heightened security concerning its confidential information.

CONCLUSIONS OF LAW

In the first of the consolidated cases, Case No. UC 98-039, the Union contends that the District retitled two bargaining unit positions, painter and carpenter, and removed the positions from the bargaining unit. In its response, the District maintains that the waterproofing technician and roof repair technician positions are newly created positions which were never in the bargaining unit. In addition, the District maintains that the waterproofing technician and roof repair technician are managerial positions that should not be included in the bargaining unit. The Board agrees with the Union that the District has improperly attempted to alter the composition of the bargaining unit.

The State Board of Mediation is authorized to hear and decide issues concerning appropriate bargaining units. Section 105.525, RSMo. 1994. The Board certified the maintenance and grounds bargaining unit after the Union won a representation election. The District may not unilaterally alter the composition of that bargaining unit. Furthermore, the District may not alter the composition of the bargaining unit by removing unit classifications under the guise of promoting otherwise bargaining unit employees to newly created, out-of-unit, managerial positions. See, *Facet Enterprises, Inc.*, 290 NLRB 152, 131 L.R.R.M. 1114 (1988) *enforced*, 907 F.2d 963 (10th Cir. 1990). “To do so would not only modify the job functions of various bargaining unit members but also affect their right to representation.” *Facet Enterprises, Inc. v. National Labor Relations Board*, 907 F.2d at 975. “Where the duties of the newly-designated out-of-unit employees are substantially similar to those of the unit employees, the transfer may be a sham....” *Id.* Furthermore, the job duties of the employees involved, and not their job titles, are determinative of whether the positions are bargaining unit positions. See, *International Association of Fire Fighters, Local 3228 v. City of Gladstone*, Case No. R 89-023 (SBM 1990).

First, an examination of the job duties of the carpenter and roof repair technician demonstrates that the job duties of the two positions are substantially similar. The job duties of the carpenter classification require carpenters to repair and install suspended ceilings, repair carpet, install new carpet, and repair roofs and flashing leaks. Tim Downey worked on the roofs by himself. He inspected roofs, investigated and charted roof leaks and performed minor roof repairs. In addition, Mr. Downey worked with the outside roofing companies with which the District contracted and reported to the companies the types of repairs which needed to be performed. Mr. Downey would ensure that the outside contractor showed up and he would direct them to where roof repairs were needed. He also replaced damaged ceiling tiles.

In comparison, the job duties of the roof repair technician require the roof repair technician to repair roofs, investigate roof leaks, follow-up on repairs to insure success, perform preventive maintenance - inspect roofs, clean all roof drains, gutters, downspouts, remove roof debris, assist in determining roof replacement; assist roof contractors, as needed; assist Audio Visual Department with antenna installation to insure no damage is done to roof; chart, log and map of all reported roof leaks; replace ceiling tile; and investigate carpet work requests; and performs small "A" projects - wall, door, shelf removal and installation.

Bill McDaniel, the roof repair technician, also works on the roof alone. Mr. McDaniel takes emergency calls concerning roof leaks and follows up on roof leaks. He either makes the repair himself or calls in the outside roofing contractor with which the District has a blanket contract to perform the work. During the summer, he coordinates with the contractors performing roofing projects for the District to ensure their needs are met. During the winter, he does general maintenance. In addition, Mr. McDaniel performs preventive maintenance such as checking drains, checking gutters, inspecting roofs, and making notes concerning the roofs' general condition and need for replacement. He inspects carpet repairs and he replaces ceiling tile when they appear to be in a dangerous condition.

The Board also finds it very significant that the roof repair technician is required to perform carpentry jobs such as remove and install walls, doors and shelves. Such required carpentry duties are not consistent with a specialized managerial roofing position. Such job duties are more consistent with the bargaining unit position of carpenter.

Based upon the foregoing, the Board concludes that the job duties of the bargaining unit carpenter assigned to roof repair and the roof repair technician are substantially similar, merely "the emphasis has changed." (Tr. 146).

As for the painter and the waterproofing technician the Board also finds that their job duties are substantially similar. The painters' job duties require the painters to prepare surfaces

for painting, patch paint, install and repair vinyl wall covering and wallpaper, set up and operate airless spray apparatus, maintain painting machines, set up and operate sandblast equipment; mix and apply epoxy, varnish and lacquer finishes, caulk joints, seal surfaces and perform other duties generally described as waterproofing.

The waterproofer's job duties require the waterproofer to repair exterior caulked joints; seal foundation walls; investigate and repair wall, foundation, window and door leaks; follow up on repairs to verify success of repair; perform preventive maintenance including inspection of exterior caulked joints and minor repair of joints. Since his promotion to waterproofing technician, Frank McCarty has worked primarily at the North High School with a bargaining unit painter, Chris Hagen. Mr. McCarty and Mr. Hagen have been working on the exterior of the North High School. They have been grinding and preparing the surface, cleaning it, recaulking the joints, and spraying sealer on the surface using a pressure-spraying machine. Mr. McCarty and Mr. Hagen have been riding in the same truck and have been using a two-man lift to work on the exterior of the building. Mr. McCarty and Mr. Hagen have also hung wallpaper together.

The Board finds it very significant that the District did not hire an individual from outside of the District with specialized skills to fill the position of waterproofing technician. There was no evidence that Mr. McCarty possessed any greater skills than any other painter in the bargaining unit. Mr. McCarty possessed no specialized skills concerning waterproofing. However, the District promoted Mr. McCarty to waterproofing technician. The District concedes that Mr. McCarty is having to learn addition skills on the job.

The Board also finds it very significant that experience in caulking and sealant application was not required of the waterproofing technician. Such experience would seem to be necessary if the position of waterproofing technician was in fact a specialized managerial position.

Finally, the Board finds it significant that Chris Hagen, a bargaining unit painter, appears to be performing the same job functions as Mr. McCarty. The two men have been working together caulking and sealing the outside of the North High School. The two men have also hung wallpaper together. If the job classification of painter and waterproofing technician were in fact different job classifications, one of the individuals has been working outside of his classification.

Based upon the foregoing, the Board concludes that the job duties of the bargaining unit painters and the waterproofing technician are substantially similar. The Board, therefore, holds that the waterproofing technician position and the roof repair technician position are not new positions, but merely new titles for previously existing bargaining unit positions.

It is also evident, from the foregoing, that the waterproofing technician position and roof repair technician should not be reclassified as managerial positions and excluded from the bargaining unit. Where a class of employees has been expressly included in a bargaining unit, the Board will not subsequently consider the exclusion of that class of employees from that unit unless the job duties of the employees in the class have undergone substantial change. *Department of Corrections and Human Resources v. Missouri State Council 72, AFSCME*, Case No. UC 89-003, at 15-16 (SBM 1989). “A substantial change in the duties of a class of employees is one which alters the basic nature of their job.” *Id.* at 16.

The District maintains that the job duties of the roof repair technician position and waterproofing technician position are managerial in nature and should therefore, be excluded from the bargaining unit. Managerial employees are not specifically excluded from the coverage of the Missouri Public Sector Labor Law. *AFSCME, Local 410 v. City of St. Louis Department of Corrections Medium Security Institution*, Case No. UC 94-043 at 10 (SBM 1995). However, this Board and the courts have carved out such an exclusion. *Id.* “In deciding whether the position in question is managerial, this Board has historically considered the

degree to which the individual participates in the formulation, determination and effectuation of management policy.” *Id.* Applying this standard, the roof repair technician and waterproofing technician are not managerial positions.

Bill McDaniel, the roof repair technician reports to the District Engineer, Scott Bennett. When a roof leak is reported, Mr. McDaniel either makes the repair himself or calls the outside roofing contractor with which the District has a blanket roofing contract to perform the work. During the summer, Mr. McDaniel coordinates with the contractors performing roofing projects for the District to ensure their needs are met. He also assists the District Engineer and Construction Supervisor in reviewing roof repair plans, specifications and drawings. He makes comments on the review of these documents. Furthermore, Mr. McDaniel completes his own weekly work schedule and submits his schedule to the District Engineer on Friday or Monday. However, the District Engineer has the final authority concerning Mr. McDaniel’s work schedule and retains the right to change the schedule when necessary. Mr. McDaniel does not have any authority to approve purchases. Furthermore, Mr. McDaniel does not supervise any other employees. He cannot hire, fire, or suspend. Mr. McDaniel receives a yearly salary. However, the District has calculated an hourly rate for him based upon 2,080 hours of work per year and Mr. McDaniel receives time and a half for overtime.

Based upon the record, Bill McDaniel, the roof repair technician, does not participate to any significant degree in the formulation, determination and effectuation of management policy.

Frank McCarty, the waterproofing technician, reports to the District Engineer, Scott Bennett. His job duties include making inspections of the District’s thirty-two buildings to identify areas which need to be addressed from a caulking standpoint. Mr. McCarty prepares his own weekly work schedule and submits his work schedule to the District Engineer on Friday or Monday. The District Engineer has the final authority concerning Mr. McCarty’s work schedule and retains the right to change the schedule when necessary. Mr. McCarty does not have any

authority to approve purchases. Furthermore, he does not supervise any other employees. He cannot hire, fire, or suspend. As the waterproofing technician, Mr. McCarty receives a yearly salary. However, the District has calculated an hourly rate for him based upon 2,080 hours of work per year and Mr. McCarty receives time and a half for overtime.

Based upon the record, Frank McCarty, the waterproofing technician, does not participate to any significant degree in the formulation, determination and effectuation of management policy. Therefore, the Board concludes that the roof repair technician and the waterproofing technician are not managerial employees and they should not be excluded from maintenance and grounds bargaining unit.

In the second consolidated case, Case No. UC 98-040, the Union contends that the District improperly reclassified the mail/confidential delivery driver position and removed it from the custodial and warehouse employees bargaining unit. The District contends that additional confidential duties have been added to the mail/confidential delivery driver position such that it is now a confidential position and should be excluded from the custodial and warehouse employees bargaining unit. On page 6 of its brief, the District admits that it reclassified the mail/confidential delivery driver position to a confidential position. The District did not create a new confidential mail delivery position. Therefore, the Board must decide if the job duties of the mail/confidential delivery driver position have changed so substantially that it must now be excluded from the custodial and warehouse employees bargaining unit.

As stated above, where a class of employees has been expressly included in a bargaining unit, the Board will not subsequently consider the exclusion of that class of employees from that unit unless the job duties of the employees in the class have undergone substantial change. *Department of Corrections and Human Resources v. Missouri State Council 72, AFSCME*, Case No. UC 89-003, at 15-16. “A substantial change in the duties of a class of employees is one which alters the basic nature of their job.” *Id.* at 16.

Although confidential employees are not specifically excluded from the coverage of the Missouri Public Sector Labor Law, case law from this Board and the courts have carved out such an exclusion. *Belton NEA/Education Support Personnel v. Belton 124 School District*, Case No. R 94-002 (SBM 1994) The confidential exclusion protects an employer's right to conduct its labor relations through employees whose interests are aligned with those of management, rather than risk having confidential information handled by people with conflicting loyalties who may be subjected to pressure from fellow bargaining unit members. *Id.* This exclusion means that confidential employees cannot be included in any bargaining unit. *Id.*

To decide whether a particular employee is a confidential employee, the Board applies the labor-nexus test. *Belton NEA/Education Support Personnel v. Belton 124 School District*, Case No. R 94-002 (SBM 1994). Under that legal standard, employees who act in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations are considered confidential employees. *Id.*

Under the NLRB's labor nexus test it is not sufficient to show that an employee has responsibility for protecting the confidences of management, or has access to confidential information. The test applies only to employees having access to advance information about management's strategy and tactics in labor matters which might be used to the detriment of management.

Parkway School District v. Parkway Association of Education, Support Personnel, PA-ESP, Local 902/MNEA, 807 S.W.2d 63, 67 (Mo. banc 1991).

"The essential issue is whether the challenged employees have such a close relation to the district's management of labor relations that the district would be prejudiced by their inclusion in a bargaining unit with other employees." *Id.* at 68. The Board, with its specialized knowledge of employer-employee relations and "the dynamics of collective bargaining in the public sector," makes the determination of whether the employer may be prejudiced. *Id.*

In order to ascertain whether a person is a confidential employee, two determinations must be made under the labor-nexus test. *Parkway Association Education Support Personnel*,

Local 902/MNEA v. Parkway School District, Public Case No. R 88-025 at 16-17 (SBM 1989).

First, the person for whom the employee works must initially be found to formulate, determine and effectuate labor relations policy. *Id.* Secondly, should the first test be met, the question shifts to the duties of the particular employee, in this case the mail/confidential delivery driver, whose inclusion in the bargaining unit is disputed. *Id.* To be excluded, the mail/confidential delivery driver must assist and act in a confidential capacity to a person who formulates, determines and effectuates labor relation policy. *Id.*

As for the first prong of the labor-nexus test, the mail/confidential delivery driver, Floyd Price, is assigned to the warehouse. However, he delivers confidential mail to the school board members homes and, on rare occasions, Mr. Price helps employees within the superintendent's office to assemble confidential information for delivery to the school board members. Clearly, the school board members and the superintendent formulate, determine and effectuate labor relations policy for the District.

The inquiry now turns to the second prong of the test, does the mail/confidential delivery driver assist and act in a confidential capacity to a person who formulates, determines and effectuates labor relation policy. Based upon the job duties of the mail/confidential delivery driver, the Board concludes that Mr. Price does not meet the second prong of the test. The vast majority of the time the confidential information being delivered to the school board members' homes is sealed in an envelope and Mr. Price has no knowledge as to the contents of the envelope. In addition, there has been no significant change in the types of documents being delivered by Mr. Price from the types of documents previously delivered by bargaining unit delivery drivers. Furthermore, there are still instances when bargaining unit delivery drivers, filling in for Mr. Price, deliver confidential mail to the school board members homes. Lastly, only on rare occasions does Mr. Price help employees within the superintendent's office assemble confidential information. Based upon the foregoing, the Board concludes that Mr.

Price has only very limited access to confidential information. In addition, there was no evidence as to how much of this confidential information deals with District labor relations policy. The District has failed to show that Mr. Price, the mail/confidential delivery driver, has such a close relation to the District's management of labor relations that the District would be prejudiced by his inclusion in the bargaining unit with other custodial and warehouse employees. See, *Parkway School District v. Parkway Association of Education, Support Personnel, PA-ESP, Local 902/MNEA*, 807 S.W.2d at 68. Therefore, the Board holds that the mail/confidential delivery driver is not a confidential employee and should remain in the custodial and warehouse employee bargaining unit.

ORDER

The State Board of Mediation finds that the waterproofing technician position and the roof repair technician position are positions within the maintenance and grounds bargaining unit established by the Board in Case No. R 96-004 and shall remain in the bargaining unit. The State Board of Mediation finds that the mail/confidential delivery driver is not a confidential employee position and should not be removed from the custodial and warehouse employee bargaining unit established by the Board in Case No. R 96-025. The mail/confidential delivery driver shall remain in the bargaining unit.

Signed this 14th day of October, 1998.

STATE BOARD OF MEDIATION

/s/ John A. Birch
John A. Birch, Chairman

(SEAL)

/s/ Patrick Hickey
Patrick Hickey, Employee Member

/s/ Lois Vander Waerd
Lois Vander Waerd, Employer Member